

VICTOR A. ANAHONAK (ON RECONSIDERATION)

IBLA 75-296

Decided June 4, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA-7203.

Petition for reconsideration granted; prior Board decision in Victor A. Anahonak, 21 IBLA 347 (1975), and decision appealed from vacated; case remanded.

1. Alaska: Native Allotments

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), if the land is included in a State selection application but is not within a core township of a Native village. Under subsection (a)(4) of that section, such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Administrative Procedure: Adjudication -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Alaska: Statehood Act -- Hearings -- Rules of Practice: Hearings

An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. But where the Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, it is improper to reject his application without affording him notice and opportunity for a hearing, and BLM must initiate contest proceedings against the application. The State of Alaska must be given an opportunity to participate as a party to such contest.

APPEARANCES: Curtis V. McVee, Alaska State Director, for the Bureau of Land Management; James E. Hutchins, Esq., James H. Holloway, Esq., Anchorage, Alaska, for respondent.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State Director of the Alaska State Office, Bureau of Land Management (BLM), has petitioned the Board for reconsideration of our decision, issued August 18, 1975, styled Victor A. Anahonak, 21 IBLA 347 (1975), wherein we reversed the Alaska State Office's decision which rejected Native allotment application, AA-7203. The application was filed by respondent, Victor A. Anahonak, pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Anahonak's application asserted that he began his use and occupancy in October of 1960.

Respondent's application was rejected by a BLM decision dated November 29, 1974, which stated in part:

[T]he substantial use and occupancy contemplated by the Native allotment act must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. (See Arthur C. Nelson (on reconsideration), 15 IBLA 76 (March 11, 1974).

According to our records, the applicant was born on September 27, 1947. In view of his birthdate, the applicant was approximately 14 years old at the time of filing of the State selection application and could not in his own right have occupied the lands claimed as an independent citizen or as head of a household prior to State selection on May 3, 1961.

The Board decision remanded the case for further consideration of evidence of respondent's use and occupancy. Anahonak had not been given an opportunity for hearing. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that Native allotment applicants were entitled to notice and an opportunity for hearing where there was an issue of fact with respect to an applicant's qualifications.

While this petition was pending, Congress enacted the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980), which has a provision concerning Alaska Native allotments. It is therefore appropriate that we initially determine whether this provision affects the adjudication of this case.

[1] Section 905(a)(1) of that statute approved all Native allotment applications pending before the Department on or before December 18, 1971, which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve in Alaska subject to valid existing rights, except where otherwise provided by other subsections of that section.

Subsection 905(a)(4) concerns the adjudication of Native allotment applications which conflict with State selection applications. The subsection provides in pertinent part:

[W]here an allotment application describes land * * * which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act from those lands made available for selection by section 11(a)(2) of the Act by any Native Village certified as eligible pursuant to section 11(b) of such Act [*i.e.*, a "core" township selection by an eligible Native village], paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act, and other applicable law.

The parcel for which appellant applied is not within the core township of a Native village, and because a State selection application has been filed for the land, the allotment is not automatically approved by the statute and must be adjudicated pursuant to the provisions of the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976). Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981); Roselyn Isaac (On Reconsideration), 53 IBLA 306 (1981).

[2] An application for a Native allotment must be rejected if the alleged use and occupancy commenced after the time that a State selection application was filed for the land. Daniel Johansen (On Reconsideration), *supra*; Roselyn Isaac (On Reconsideration), *supra*; Andrew Petla, 43 IBLA 186 (1979). But where the Native allotment applicant alleges use and occupancy prior to the filing of a State selection application, it is improper to reject his application without affording him notice and opportunity for a hearing, and BLM must initiate contest proceedings against the application. See Pence v. Kleppe, *supra*; Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976); sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The State of Alaska must be given an opportunity to participate as a party to such contest. See State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979).

If, however, the BLM upon further review of this case determines that the allotment may be allowed without a Government contest against the Native allotment applicant, it must notify the State of Alaska of this determination. Upon such notification, the State, if dissatisfied, has an election of remedies. It may initiate a private contest within the time period prescribed in the notice, or it may appeal the decision of BLM, after it becomes final, to this Board. If the Board concludes that the Native's application is deficient, it will order the initiation of a Government contest. But if it finds the allotment application acceptable, it will order the issuance of a patent, if all else be regular. State of Alaska, 42 IBLA 94 (1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision in Victor A. Anahonak, supra, and the decision appealed from are vacated, and the case remanded for further action consistent with this opinion.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

